No. 141.
Brief of Redington
Filed Jan. 31, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 141.

CARRIE MOSS, Appellant,

vs.

RICHARD DOWMAN, Appellee.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANT.

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STATEMENT OF FACT.

The case at bar is an appeal from a decree of the circuit court of appeals for the eighth circuit, affirming a decree of the circuit court for the district of Minnesota, which last-mentioned decree sustained a demurrer to and dismissed a bill filed by appellant, complainant below, against appellee, defendant below, the purpose and object of which was to charge the legal title to certain real estate standing in defendant with an equitable title alleged to be in complainant upon facts averred in the bill.

March 17, 1897, the United States, by its proper officers, after considerably extended litigation in the Land Department between the appellant and appellee, wherein each claimed to be entitled to a patent for the premises in dispute, then public land, issued a patent therefor to the appellee, the said tract being technically described as the S. E. ¼, sec. 22, tp. 65 N., R. 4 W., Minnesota (Transcript, p. 12).

March 23, 1897, the appellant, complainant below, filed in the circuit court of the United States for the district of Minnesota, fifth division, within which division both parties were resident and the property was situated, her bill in equity against the appellee, defendant below, predicated upon the claim that, in the issue of the patent above referred to, the Land Department had erroneously applied the law to the facts as found by said department, and that upon a proper application of the law to such facts a patent should have issued to appellant. The substantial relief prayed was: (1) that title be decreed to be in the complainant; (2) that defendant be decreed to hold the legal title as trustee for complainant; (3) that defendant be perpetually enjoined from interfering with complainant in her enjoyment of the premises, and (4) that defendant be decreed to convey the legal title to complainant. The averments of the bill, with accompanying exhibits material to the case as here presented, are substantially as follows (Transcript, pp. 1 to 36):

(*a.*) The premises in controversy were surveyed in the years 1876 and 1877; plat of survey was filed February 6, 1878, and the land thereby became and thereafter remained subject to entry under the homestead laws (Bill, par. 4; Transcript, p. 2).

(*b.*) May 7, 1890, one Robert H. Doran, in the usual and customary form, made homestead entry of the land at the proper local land office. Said entry was duly noted and entered upon all the proper and usual books and records of

the local office. In due course of business it was reported by the local officers to the General Land Office, at Washington, and therein noted and entered in and upon all the customary books and records, and, so made, noted, entered, and recorded, remained so of record from said 7th day of May, 1890, to the 24th day of October, 1890 (Bill, par. 5; Transcript, pp. 2, 3; Exhibits A and B, Transcript, pp. 15, 16; Secretary's decision, Exhibit M; Transcript, p. 24).

(*c.*) By a well-settled rule, regulation, practice, and construction of the Land Department, Doran, under his entry aforesaid, was allowed six calendar months from date thereof within which to make settlement and residence upon the land and otherwise comply with law, and, under said rule, such entry remained in full force and effect as a valid entry and appropriation from its date until canceled, upon voluntary relinquishment, October 24, 1890 (Bill, par. 6; Transcript, p. 4; Exhibit M, Transcript, p. 24).

(*d.*) October 24, 1890, within the six-month period aforesaid, Doran contracted and agreed with appellant, in consideration of the payment of $1,000, to execute and file a relinquishment to the United States of his said homestead entry. The above-named consideration was paid by appellant, and thereupon Doran executed said relinquishment and delivered it to appellant, with full authority and direction to file the same in said local office (Bill, par. 7; Transcript, pp. 4, 5; Exhibit C, p. 16).

(*e.*) October 24, 1890, appellant filed the above-described relinquishment in the local office, and the register and receiver cancelled the entry upon their records, in conformity to act of May 14, 1880, sec. 1, 21 Stat., 140 (Bill, par. 7; Transcript, p. 5).

(*f.*) October 24, 1890, aforesaid, appellant, being in all respects qualified under the law, simultaneously with the

filing of Doran's relinquishment, and as part of one and the same transaction, also filed her own application to enter said land as a homestead. This application was immediately, upon cancellation of the Doran entry, as aforesaid, and as part of one and the same transaction, allowed by the register and receiver, an entry was made and duly entered upon all the usual records, and certificate therefor in usual form was issued to complainant. The filing of the relinquishment, the cancellation of the Doran entry, the tender of the appellant's application, its allowance, the entry by appellant, the notation of such entry upon the records, and the issue of certificate therefor were all simultaneous acts and part of one and the same transaction (Bill, par. 7; Transcript, pp. 5, 6; Exhibits D, E, pp. 16, 17).

(*g.*) Within six calendar months immediately succeeding the date of her entry, appellant, at great expense and undergoing many hardships, made settlement upon the land, established residence thereon, cultivated and improved the same, and in all respects fully complied with the law, so continuing until October 22, 1892, when, after due preliminary proceedings had, she made final proof of this compliance before and to the satisfaction of the register and receiver, and tendered to said officers full payment for said land, thus becoming entitled to final certificate and patent, except for the existence of the adverse claim of defendant then pending (Bill, pars. 8, 10, 17; Transcript, pp. 6, 7, 8, 9, 10, 12).

(*h.*) September 19, 1890, while the entry of Doran still remained of record and uncanceled, the appellee Dowman made settlement upon the premises. He lived thereon continuously thereafter until November, 1890, with the exception of one absence, from October 19, 1890, to October 24, 1890, on which last-mentioned date he returned from said

absence to the land. The exact finding of the secretary upon these facts was as follows (Exhibit M, p. 27):

"Dowman * * * went on the land September 19, 1890, and began the construction of a house, which he finished October 10th following. From that time he made the land his home, actually living there continuously until November, 1890, with the exception of a trip to the county town for provisions, which he made October 19, 1890, returning October 24, 1890, the day Doran's relinquishment was filed."

The bill (par. 7, Transcript, p. 5) alleges that Doran's entry was canceled and appellant's entry was allowed "about the hour of eleven o'clock a. m. and not later than eleven o'clock and thirty minutes a. m." upon the 24th day of October, 1890. No other or different hour for the occurrence is found or fixed by the Secretary's decision. The bill further alleges (par. 9, Transcript, p. 8), *inter alia*, that appellee made *no settlement* upon the land whatever, and in no way *personally connected himself with said tract at* any hour upon said 24th day of October, 1890, and that upon the hearing appellant proved by many witnesses that appellee "was not upon said land during any portion of the twenty-fourth day of October, 1890, or, in any event, was not thereon at any hour of said day *earlier than two o'clock p. m.*" Considering, therefore, as established the fact found by the Secretary, to wit, that appellee *returned* to the land October 24, 1890, and the additional and not inconsistent facts alleged in the bill, as above recited, and we have, for the purposes of this hearing, the following established facts: First, that Doran's entry was canceled and appellant's entry was completed as early as 11.30 a. m., October 24, 1890; second, that appellee returned to the land upon this last-mentioned date; third, that this return was not earlier than 2 p. m.; fourth, that after his return he performed no specific act of settlement that day upon the land.

(*i.*) The application of supposed law to this state of fact, in the determination by the Secretary of the Interior of the rights of the litigants respectively, was as follows (Exhibit "M," Transcript, pp. 26, 29):

"The only question to determine in this case is, whether Dowman was a settler in good faith at the time Doran's relinquishment was placed on file in the local office. For, although Doran's entry was erroneously allowed, being of record it segregated the land, and therefore no right could be initiated by reason of the settlement. *But the instant the relinquishment was filed in the local office, the right of the settler on the land attached and an entry could not defeat it.*"

* * * * * *

"In view of these facts and that no evidence has been introduced which shows that Dowman's settlement was not in good faith, under the established rulings of this Department the settler Dowman's rights *attached instantly on the filing of Doran's relinquishment*, and is therefore superior to Moss's entry."

(*j.*) Upon this application of law to ascertained facts as recited, and upon no other or different facts, patent issued to appellee as hereinbefore recited (Bill, par. 15; Transcript, p. 12).

July 3, 1897, the appellee, defendant below, filed a demurrer to the foregoing recited bill (Transcript, pp. 40 to 43); October 15, 1897, said demurrer was argued and submitted (Transcript, pp. 44, 45); October 26, 1897, the court below filed its written opinion or decision upon said submission (Transcript, pp. 46 to 49), and thereupon, November 4, 1897, a decree was made and entered sustaining said demurrer and dismissing the bill of complaint (Transcript, pp. 49, 50). The learned and distinguished judge in the circuit court, in sustaining the action of the Secretary of the Interior in his application of the law to the facts found, in his opinion (Transcript, p. 48) thus, in part, announced his views:

"The filing of the relinquishment left the land open to appropriation; and the earliest appropriation of it under the land laws would attach to and hold the land. The arrangement gave the complainant opportunity to act quickly, but if the right of another attached more speedily she would fail. Dowman was then on the land, an actual resident and settler. While Doran's entry continued, Dowman could acquire no right by settlement, but the instant that entry was relinquished his right as settler attached, and no new entry, however 'simultaneous' with the relinquishment, could be thrust in between Doran's relinquishment and Dowman's rights as a settler upon the land."

December 15, 1897, appellant filed her appeal to the circuit court of appeals from the above-mentioned decree of the circuit court upon the same day she filed bond upon appeal. Citation was duly issued and served, and the cause thus came before the circuit court of appeals for review (Transcript, pp. 52 to 54).

June 27, 1898, the circuit court of appeals, upon consideration of said appeal, affirmed the decree of the circuit court (Transcript, Opinion, pp. 57 to 63; Decree, p. 63).

August 20, 1898, the appellant filed her appeal to this court. August 30, 1898, said appeal was allowed by the circuit judge (Transcript, p. 65). September 1, 1898, she filed affidavit showing the property involved to be of the value of not less than $3,000 (Transcript, pp. 63, 64). On the same day she filed bond upon appeal, which was approved by the circuit judge (Transcript, pp. 66, 67). September 5, 1898, citation, with acceptance of service, was filed (Transcript, pp. 67, 68), and the cause thus comes before this court for review.

ASSIGNMENT OF ERRORS.

The following is the assignment of errors in this court (Transcript, pp. 64, 65):

I.

In that by the record aforesaid it appears that a decree was entered in favor of said appellee and against said appellant, whereas by the law of the land the said decree ought to have been in favor of said appellant and against said appellee.

II.

In that there was error in said decree of said court of appeals in affirming the decree of the circuit court of the United States for the d strict of Minnesota, fifth division, because said circuit court in and by its decree erroneously sustained the demurrer to appellant's bill of complaint.

III.

In that there was error in affirming the decree of said circuit court, because said court ought to have overruled said demurrer.

IV.

In that there was error in affirming said decree of said circuit court in sustaining said demurrer, because the facts stated in appellant's bill of complaint justly entitled her to the relief therein prayed for.

V.

In that there was error in affirming said decree of said circuit court, because the same erroneously dismissed appellant's bill of complaint.

VI.

In that there was error in affirming said decree of said circuit court, because the same erroneously directed that the said appellee recover of said appellant costs and disbursements, taxed at twenty-seven dollars and fifty-five cents ($27.55).

BRIEF.

I.

EO INSTANTI ATTACHMENT OF SETTLER'S RIGHT.

The theory upon which the decision in the court below proceeds is that a settlement, followed by residence, made upon appropriated or reserved lands, although originally unlawful and a trespass, will, nevertheless, upon cancellation of the appropriation or restoration of the land, become thereby instantly valid, so as to exclude the entry of a third party made simultaneously with the release of the land.

We submit with great deference that this is a misconception of the law; that no settlement upon appropriated land can give a settler thus violating the law precedence over a third party applying the instant of cancellation, who is in all respects within the law, and that no decision ever made, either in the department or the courts, is authority for such a position.

We submit that the law does not permit the wrong-doer to take advantage of his own misdeed to work a forfeiture of property rights in his law-abiding neighbor; that, as against such innocent third person, no equity ever arose or could ever arise upon an unlawful act, and that no such claim is entitled to recognition except upon proof of some distinct act of personal settlement subsequent to the restoration of the land.

We concede, at the outset, that both parties to the case at bar are concluded as to the facts found by the Secretary of the Interior in his decision of December 19, 1894, Exhibit M. The general proposition that the courts will not re-examine questions of fact litigated before executive officers in matters confided by law to their jurisdiction, and by such officers decided, is settled by authority.

It is equally well settled, and by the same line of authorities, that whenever, upon facts so found, the law has been misconstrued or misapplied, the courts will, in a proper proceeding, grant relief to the party aggrieved. All questions of fact presented and decided in a controverted proceeding are concluded by the departmental decision and are binding upon the court; but where the officers of the Land Department have, by mistake of law, given to one man the land which, upon the facts found, belongs to another, equity will grant relief by putting the title where of right it ought to be.

Johnson *vs.* Towsley, 13 Wal., 72.
Bagnell *vs.* Broderick, 13 Pet., 436.
Warren *vs.* Van Brunt, 19 Wal., 646.
Shepley *vs.* Cowen, 91 U. S., 330.
Moore *vs.* Robbins, 96 *ib.*, 530.
Quinby *vs.* Conlan, 104 *ib.*, 420.
St. Louis Smelting Co. *vs.* Kemp, *ib.*, 636.
United States *vs.* Minor, 114 *ib.*, 233.
Lee *vs.* Johnson, 116 *ib.*, 48.
Sparks *vs.* Pierce, 115 *ib.*, 408.
Bowhall *vs.* Dilla, 114 *ib.*, 47.

The question thus arises whether, upon the facts found by the Secretary's decision and other not inconsistent facts well pleaded in the bill, the patent to appellee was properly or improperly issued under the law. If the latter, the decree below must be reversed.

The important, material facts to be, in this connection, carefully borne in mind are. (1) That at the date of appellee's settlement upon the land the tract was covered by the valid subsisting homestead entry of Doran; (2) that simultaneously with the relinquishment of Doran, and as part of one and the same act, appellant made homestead entry of the tract; (3) that at the time of such relinquishment and entry appellee was not upon the land and did not there-

after go thereon until several hours later ; (4) that at no time during any portion of the day upon which such relinquishment and entry were made did appellee perform any act of settlement upon the tract. Under these circumstances we submit that the settlement of appellee made during the reservation of the land gave him no right which, upon cancellation of the Doran entry, could *eo instanti* attach to the exclusion of the entry of appellant.

It is well settled by a long line of adjudicated cases, both in the Land Department and the courts, that an entry of public lands under any of the general laws for the disposition of the public domain instantly creates in respect thereto an appropriation thereof reserving and excepting the same from any subsequent settlement and any further or other disposition so long as said entry remains uncanceled upon the records of the Government, and that this proposition is true, irrespective of any question affecting the regularity or legality of the entry.

A *prima facie* valid entry of record operates to appropriate the land covered thereby and to reserve it pending the existence of such prior entry from all subsequent disposition.

Davis *vs.* Crans, 11 C. L. O., 22.
Graham *vs.* H. & D. R. R. Co., 1 L. D., 362.
Whitney *vs.* Maxwell, 2 *ib.*, 98.
Henry Cliff, 3 *ib.*, 216.
Ernest Trelut, *ib.*, 228.
Simpson *vs.* Foley, 4 *ib.*, 21.
So. Mo. R. R. Co. *vs.* Bottomly, *ib.*, 208–210.
Hugh Barclay, *ib.*, 390–392.
Legan *vs.* Thomas *et al.*, *ib.*, 441.
Pfaff *vs.* Williams *et al.*, *ib.*, 455–457.
Milton Townsite *vs* Gann, *ib.*, 584–586.
Schrotberger *vs.* Arnold, 6 *ib.*, 425.
Mudgett *vs.* D. & S. C. R. R. Co., 8 *ib.*, 243.
James A. Forward, *ib.*, 528.
Allen *vs.* Curtius, 7 L. D., 444.
Ludwig May, 13 *ib.*, 297.

An allowance of an entry appropriates and segregates the land, even though said entry by mistake of the proper officers is not made matter of record.

Linville *vs.* Clearwaters *et al.*, 11 L. D., 356.
Henry Milne, 14 *ib.*, 242.

Even where such an entry was made by an alien, the department has held that the entry while of record worked an appropriation of the land.

Leary *vs.* Manual, 12 L. D., 345.

The same rule has been applied in repeated instances to invalid entries, voidable only.

St. Paul M. & M. R. R. Co. *vs.* Forseth, 3 L. D., 446.
St. Paul M. & M. R. R. Co. *vs.* Leech, *ib.*, 506.
Hollants *vs.* Sullivan, 5 *ib.*, 115.

To precisely the same effect are all the adjudications of the Federal courts from the earliest date.

Chotard *vs.* Pope, 12 Wheat., 586, 588.
Wilcox *vs.* Jackson, 13 Pet., 498.
Bagnell *vs.* Broderick, 13 Pet., 436.
Cunningham *vs.* Ashley, 14 How., 387.
Witherspoon *vs.* Duncan, 4 Wall., 218.
Johnson *vs.* Towsley, 13 *ib.*, 73, 75.
Railroad *vs.* Whitney, 132 U. S., 357.
Bardon *vs.* N. P. R. R. Co., 145 U. S., 538.
McIntyre *vs.* Roeschlaub *et al.*, 37 Fed. R., 566.
Hartmann *vs.* Warren, 76 Fed. Rep., 157.

It necessarily follows, in the case at bar, that the Doran entry, so long as it remained uncanceled, removed the land from any settlement by appellee; that when the latter made his pretended settlement and thereafter continued a residence upon the tract he was simply a trespasser, and that

at no time prior to the appropriation of the land by the entry of appellant could he have acquired any right whatever in or to the same.

We submit that it is equally clear, both upon reason and authority, that after the determination of the appropriation by the Doran entry the appellee, especially as against the entry of appellant, could acquire no valid settlement claim except by some new and distinct act of settlement, and that as no such act antedated the entry of appellant, the latter claim is paramount.

An examination of the departmental decisions upon this question, from the earliest reported cases, will show:

First. That from 1859 to 1885, a period of over twenty-six years, an uninterrupted chain of cases held that no right upon cancellation of an entry inured by reason of a settlement made during its existence; that to hold otherwise would be to enable a trespasser to benefit by his own wrong, and that any such pretended claim was invalid and of no effect against another entry made at the time of cancellation.

Gilman *vs.* Gray, Lester's L. L., vol. 1, pp. 407, 408.
Beebe *vs.* Hurlburt, Copp's L. L. (1875), 315.
Crystal *vs.* Dahl, *ib.*, 316.
Eno *vs.* McDonald, *ib.*, 317.
Peterson *vs.* Kitchen, 2 C. L. O., p. 181.
Porter *vs.* Johnson, 1 Copp's L. L. (1882), 544.
Dietrick *vs.* Bissey, *ib.*, 546.
Timmons *vs.* Gleason, *ib.*, 551.
Corrigan *vs.* Ryan, *ib.*, 542.
Tilton *vs.* Price, 4 L. D., 123.

It will thus be observed that the principle for which we are contending was specifically announced as the law of the land by Secretary Thompson as early as 1859, and from that date down to the year 1885, a period of twenty-six

years, that principle prevailed as the sole rule of decision in the Land Department. During all of this time there is no break whatever in the line of authority which declares that no right can be initiated upon appropriated or reserved lands by intrusion thereon before restoration to market. This series of decisions is as clear a line of well-established precedents declaring a settled doctrine as can be found in the whole history of land jurisprudence. It is precisely such a line of authorities as calls into operation the rule of *stare decisis*. We submit with the utmost confidence that any executive officer who, in 1885, had undertaken to hold otherwise than in accordance with this principle would have clearly and properly subjected himself to the charge of gross violation of established law and precedent.

Second. That from about the year 1885 to the present date, a period of twelve years, there has been a somewhat extended line of cases which may be divided or classified, according to their tenor and effect, as follows:

(*a.*) Cases where, as in Peterson *vs.* Kitchen, *supra*, the claim of a settler was recognized who had entered upon land during its reservation, not of his own wrong, but by permission of the then claimant.

Houf *vs.* Gilbert, 5 L. D., 238.

(*b.*) Where both parties had settled during the appropriation and were in equal degrees trespassers and in default of law, the earliest settler being admitted upon the theory that legal rights, or want thereof, being equal, equities as between the two should prevail.

McAvinney *vs.* McNamara, 3 L. D., 552.
Geer *vs.* Farrington, 4 L. D., 410.
Gudmundson *vs.* Morgan, 5 L. D., 147.
Neilson *vs.* Shaw, 5 L. D., 358, 387.
Tarr *vs.* Burnham, 6 L. D., 709.

Kruger *vs.* Dumbolton, 7 L. D., 212, 214, 215.
Rockwell *vs.* Crockett, 9 L. D., 89.
Hall *vs.* Levy, 11 L. D., 284.
Etnier *vs.* Zook, 11 L. D., 452, 454, 455.
Smith *vs.* Place, 13 L. D., 214.
McInnis *vs.* Cotter, 15 L. D., 583.
McGowan *vs.* McCann, 15 L. D., 542.
Lough *vs.* Ogden, 17 L. D., 171.
Davidson *vs.* Gelinas *et al.*, 18 L. D., 392.
Settoon *vs.* Tschirn, 19 L. D., 1.
McMichael *vs.* Murphy, 20 L. D., 147, 150.
Hunter *vs.* Blodgett, *ib.*, 452, 454.
Spring *vs.* Reinbold *et al.*, 25 *ib.*, 37.
Giles *vs.* Troop, *ib.*, 448.

(*c.*) Cases where a settler was actually personally present upon the land, having and proving some specific connection therewith at the very instant of cancellation, in the nature of a settlement, in which cases, by a stretch of judicial interpretation, in our judgment neither well founded nor wise, the settler is supposed, immediately upon cancellation, to be purged of his previous illegal status and instantly habilitated with the garb of an honest settler.

McAvinney *vs.* McNamara, 3 L. D., 552.
Millis *vs.* Burge, 4 L. D., 446.
Wiley *vs.* Raymond, 6 L. D., 246–248, 249.

(*d.*) A list of five very recent cases in which a settlement made during an appropriation has been held good as against a filing or application tendered simultaneously with the relinquishment or cancellation; of which cases, however, only *two* stand upon all fours with the case at bar, and in respect

to which two one is clearly to be distinguished from that here under consideration.

Pool *vs.* Moloughney, 11 L. D., 197 (Assistant Secretary Chandler, Aug. 20, 1890).

Stone *vs.* Cowles, 13 L. D., 192 (Assistant Secretary Chandler, Aug. 24, 1881); Review, 14 L. D., 90.

Zaspell *vs.* Nolan, 13 L. D., 148 (Assistant Secretary Chandler, Aug. 11, 1891).

Fosgate *vs.* Bell, 14 L. D., 439 (Assistant Secretary Chandler, April 30, 1889).

Blauvelt *vs.* Masden, 18 L. D., 538 (Secretary Smith, June 18, 1894).

In two of these cases the application to enter upon cancellation was tendered by the very person who relinquished the prior entry while in default of law, and who was, of course, not an innocent third party applying at the instant of relinquishment by a stranger.

Zaspell *vs.* Nolan, 13 L. D., 148.

Fosgate *vs.* Bell, 14 *ib.*, 439.

In another of said cases the settler had originally entered not of his own wrong, but by permission, through *mesne* conveyances, of the owner of the canceled entry, and, in addition, as would appear from the decision on review, was considered as being actually personally present upon the land at the instant of cancellation.

Stone *vs.* Cowles, 13 L. D., 192; 14 *ib.*, 90.

The case of Pool *vs.* Moloughney (*supra*), decided by Mr. Assistant Secretary Chandler, August 20, 1890, is the first case ever reported, standing upon all fours with that at bar, in which the so-called *eo instanti* doctrine was applied.

Up to that point we assert with positive assurance that no decision can be found arising upon the same state of facts and deciding against the principle for which we are contend-

ing. We assert with equal positiveness that this decision was made upon an entire misconception of the authorities upon which it purports to be based; that it is not expressive of the law as it then existed, even under authorities which it cites, and that it has never since been followed in any case presenting the same facts.

In this particular case the land in controversy was withdrawn for the benefit of the Atlantic and Pacific railroad, and this withdrawal was formally released and extinguished May 24, 1886, on which last-mentioned date, at exactly at what relative time is not shown, the premises were entered by Moloughney as a soldier's homestead. July 23, 1886, Pool filed a homestead application, alleging settlement May 14, 1886. The testimony showed that Pool had settled upon the land during the reservation, and was an actual resident thereon, with valuable improvements, at the date the land was restored to market.

Admitting, for the sake of argument, that Moloughney's entry was made simultaneously with the release of the reservation (which fact, however, does not appear), it would then follow that the facts in this particular case are on all fours with that at bar. The decision of the case sustains the right of Pool in these words:

"The department has repeatedly held that where land had been covered by a homestead or other entry that was afterwards canceled, the settlement upon the tract prior to such cancellation, especially if attended by the possession and ownership of valuable improvements, whether made or purchased, was sufficient to constitute a legal claim that would attach to the land the instant it became again a part of the public domain."

With great respect for the learned Assistant Secretary who signed this decision, we submit, with absolute confidence, that the above quotation is an entire misconception and misstatement of the law as it existed at that date and as it now exists. The doctrine said to have been repeatedly held

by the department had not, as we have already shown, ever been announced, in any decision standing upon the same facts as the case then before the department or as appear in the case at bar. The Assistant Secretary simply fell into grievous error in failing to observe and note the distinction between the previously adjudicated cases and the case then before him, in respect to the situation of the parties. Seven cases are cited in this decision as authority for the position taken. Six of these cases are the identical authorities which we have previously herein classified and shown not to be authority for the position taken, and the seventh case, that of Cathran *vs.* Davis (5 L. D., 249), cannot possibly, by the wildest imagination, be considered an authority upon either side of the proposition. Under these circumstances we are entirely within the limit of legitimate contention when we assert that this decision, the only one extant which actually reaches our case, is not even persuasive authority, and if it were to be considered as an authority, it would simply be one case as against the years of adjudication which we have previously shown.

The remaining case of Blauvelt *vs.* Masden (*supra*) decided by Secretary Smith, June 18, 1894, is of even less persuasive authority. In this case it appears that the premises in controversy had been included in a timber-culture entry which was relinquished to the United States March 21, 1888. On the day of this relinquishment Masden appears to have settled upon the land, at what precise hour does not appear, and subsequently upon the same day filed declaratory statement. Blauvelt alleged settlement in February, 1885, during the continuance of the reservation. From this statement of facts it will be seen that the question here arose between a claimant who must have made a separate and independent act of settlement subsequently to the cancellation, and a contestant who was upon the land necessarily at a point of time subsequent to the cancellation and prior to Masden's settlement. In other words, it was a case

where an independent act of settlement was necessarily involved in favor of Blauvelt, after the act of restoration and prior to the settlement of Masden. Each party was asserting title under a settlement, and the successful party was entitled to a decision without any reference whatever to the question of law which we have now under consideration. Under such circumstances it is obvious that the case is to be distinguished from the one at bar, and that whatever expressions may be found therein upon the *eo instanti* doctrine are not to be taken as controlling authority.

(*c*.) To the foregoing it should be added that the later decision by Mr. Secretary Smith, made February 25, 1895, and cited *supra*, held in effect that the so-called *eo instanti* doctrine applies only in a case where the settler is actually upon the land at the very instant of cancellation.

McMichael *vs.* Murphy, 20 L. D., 147, 150.

It follows that the case at bar is to be disposed of, so far as departmental authority is concerned, upon an uninterrupted line of decisions extending over a period of twenty-six years, and acquiesced in or announced by every Secretary from the administration of Secretary Thompson, in 1859, to that of Secretary Lamar, in 1885, opposed only by the single decision of Assistant Secretary Chandler, in 1890, in the case of Pool *vs.* Moloughney. Under such circumstances, and standing upon the authority of departmental decisions alone, we submit that the appellee, by his unlawful and illegal intrusion upon the premises in controversy, obtained no right whatever as against the appellant under her entry made simultaneous with the cancellation.

We have no reference to any case where the precise question at bar, arising upon identical facts, has arisen and been decided in the Federal courts; but the underlying principle leading to the conclusion for which we contend is necessarily found in many cases fairly illustrated by those

hereinbefore cited upon the question of appropriation by entry and its effect, and has been recently announced by the Supreme Court in a case upon which we rely as practically controlling and settling the pending controversy.

Wood *vs.* Beach, 156 U. S., 549.

From the foregoing considerations, it necessarily results that, inasmuch as the outstanding legal title in the appellee is based upon no claim of right prior to appellant's entry except a settlement made and residence established and continued while the land was covered by an uncanceled homestead entry, with no subsequent act of settlement alleged or proven, such legal title is invalid as against complainant, and this appearing upon the face of the bill, the demurrer must be sustained.

II.

NO CULTIVATION SHOWN BY APPELLEE.

The bill of complaint (par. 18; Transcript, p. 13) avers the finding of certain facts by the Secretary relative to defendant's supposed compliance with law; alleges that these were the only facts so found, and shows that the Secretary made no finding whatever that the defendant at any time cultivated any portion of the land. As cultivation is one of the requisites of a valid homestead claim, and essential to be proved before patent issues, and as want of this essential prerequisite appears upon the face of the bill, the demurrer should for this reason have been overruled.

III.

FACTS AVERRED SHOW NO RIGHT IN APPELLEE.

The bill of complaint (paragraphs 18 and 19; Transcript, pp. 13 and 14) shows the facts upon which the title of defendant was founded. Whether in view of these facts the

defendant was entitled to a patent is a question of law ; and if, as we claim, such facts show the defendant not to have been so entitled, then the Secretary proceeded in error of law, and as this fact appears upon the face of the bill, the demurrer should for this reason also be overruled.

IV.

Upon the foregoing consideration we submit that the decree in the court below was entered in error, and that the same should be here reversed.

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Solicitor for Appellant.

THOMAS J. DAVIS, *Of Counsel.*